No. 12,889

IN THE

United States Court of Appeals

For the Ninth Circuit

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD. (a corporation),

Appellant,

vs.

VIKING AUTOMATIC SPRINKLER COMPANY (a corporation),

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANT'S CLOSING BRIEF.

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We have examined the brief presented by appellee. It is divided into four parts. It does not appear that any of the points made are well taken. Since this record is short and since we have stated our position in our opening brief, we will but briefly comment upon each of the points made by appellee. The discussion will be in the same order as presented in appellee's brief.

I.

Appellee acknowledges the statement of the rule as we have expressed it in our opening brief, but contends that since there was not an *express* statement in the indemnity agreement concerning the negligence of the Austin Company that there was no such coverage. It needs no citation of authority for the proposition that to make a binding contract no particular form or particular words need be employed. The intent of the parties is to be gathered from a fair construction of the language used. Paragraph 7 of the contract provided that the Viking Company was to indemnify the Austin Company "against all claims for damages." There is no broader, more universal or embrasive word in the English language than "all." All damages means just what it says, including damages arising from the negligence of the Austin Company.

Judge Erskine was of the opinion that the contract contained a "latent ambiguity * * *" which "required the taking of testimony." Therefore, as Judge Erskine pointed out, if there were some ambiguities the appellant should have been allowed to produce the proffered evidence to throw light upon the true intent of the parties.

II.

Excerpts are taken from the record quoting the statements of Mr. Healy who was presenting the matter for appellant in the trial court. Such statements

are taken out of context and are misleading. Reference is made to the entire colloquy by the Court and counsel and attention particularly directed to the discussion at page 45 of the record. It was appellant's position that a proper interpretation of the contract would of necessity lead to a directed verdict in favor of the plaintiff:

> "Mr. Healy. I think it is. I think, your Honor, if we prove that, as I am certain we can, I think your Honor would have to direct the Jury to render a verdict for the plaintiff, I really think so." (R. 45.)

The Court not agreeing with appellant, appellant was then required in line with Judge Erskine's view to explain any ambiguity.

III.

Appellee claims that there was no proper foundation laid and there was a violation of the best evidence rule concerning the proffered evidence of insurance. This point is without any substance whatsoever. The Court well knew what was being offered and ruled that it was immaterial. The objection to the evidence was not sustained on any technical ground but went to the heart and merits of the case. The Court specifically stated:

> "Mr. Healy. I ask permission to question that man upon his policy. I think you can take that outside of the presence of the Jury.
>
> The Court. To save your record in the matter, I will hold that that is immaterial, and I will

sustain the objection to that testimony as to the purpose for which it is sought.

Mr. Healy. It will be understood that I have asked the question clearly, we all understand the force of it, and it was argued.

The Court. It will be understood that you have asked the same question again that you asked previously, and that I sustained the objection on the ground that that is immaterial to the resolution of this question.

Mr. Healy. Very well." (R. 129.)

IV.

An analysis of the last point made by appellee only serves to demonstrate the soundness of appellant's position. As we pointed out in our opening brief, page 15 et cetera, this was a cost-plus, a fee contract. The cost would be ultimately borne by the Austin Company. The parties entered into an elaborate scheme for insurance. Austin Company could not be held liable for the torts or wrongdoings of its subcontractor Viking Company. It is inconsistent with good business practice and altogether illogical to have required the carrying of such insurance if the same were meaningless. Reference is made to pages 13-19 of appellant's opening brief for further discussion of this point.

CONCLUSION.

It is respectfully submitted that the Court erred in refusing to allow appellant to question and prove by the witness Johnson that appellee had a contract of public liability insurance with a contractual endorsement; and that the Court erred in taking the case from the jury and dismissing the action. Reversible error having been committed the judgment should be reversed and a new trial granted.

Dated, San Francisco, California,
August 31, 1951.

Respectfully submitted,
HEALY AND WALCOM,
By JOHN J. HEALY,
Attorneys for Appellant.